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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 634

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THE BALTIMORE AND OHIO RAILROAD COMPANY,

*Petitioner,*

Cal-Be

vs.

ALBERT C. JOSEPH,

Administrator of the Estate of Wilma Winland,  
deceased,  
*Respondent.*

PETITION FOR WRIT OF HABEAS CORPUS  
To the United States Circuit Court of Appeals  
For the Sixth Circuit and  
BRIEF IN SUPPORT THEREOF.

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## **INDEX.**

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### **PETITION FOR WRIT OF CERTIORARI:**

A. Summary Statement of the Matters Involved . . . .	1
B. Jurisdiction . . . . .	5
C. Questions Presented . . . . .	5
D. Reasons Relied Upon for the Allowance of the Writ	6

### **BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI:**

I. Opinion of the Circuit Court of Appeals . . . . .	9
II. Jurisdiction of This Court . . . . .	9
III. Statement of the Case . . . . .	10
IV. Assignments of Error . . . . .	12
V. Argument . . . . .	13
A. The Circuit Court of Appeals Erred in Failing to Decide that Respondent's Decedent Was Guilty of Negligence that Prevented Her Recovery . . . . .	13
B. The Circuit Court of Appeals Erred in Deciding that the "Last Clear Chance" Doctrine was Applicable . . . . .	19
C. The Decision of the Circuit Court of Appeals Permits Thomas Winland to Recover for the Pecuniary Value of His Wife's Services and Assistance Even Though the Law of Ohio Denies a Negligent Beneficiary Any Recovery in a Wrongful Death Action . . . . .	25
Conclusion . . . . .	28

## Cases Cited.

<i>The Baltimore &amp; Ohio Railroad v. Heck, Admx.</i> , 117 O. S. 147 .....	16
<i>The B. &amp; O. Railroad Co. v. McClellan, Admr.</i> , 69 O. S. 142 .....	18
<i>B. &amp; O. Railroad Co. v. Reeves</i> , 10 F. (2d) 329 (C. C. A. 6), (pp. 332-3) .....	25
<i>Brock v. Marlatt, Admx.</i> , 128 O. S. 435, 438-9.....	7, 21
<i>Buell, Admx. v. New York Central Railroad Co.</i> , 114 O. S. 40 .....	40
<i>Carter v. Carusi</i> , 112 U. S. 478 .....	25
<i>Chunn v. The City &amp; Suburban Railway of Washington</i> , 207 U. S. 302 (1907) .....	20
<i>Cleveland, Akron &amp; Columbus Ry. Co. v. Workman, Admr.</i> , 66 O. S. 509, at page 545 .....	26
<i>Cleveland, Cincinnati, Chicago &amp; St. Louis Ry. Co. v. Grambo, Sr., Admr.</i> , 103 O. S. 471, at page 478...	26, 27
<i>C. C. C. &amp; St. Louis Ry. Co. v. Lee, Admr.</i> , 111 O. S. 391 ..	18
<i>The Cleveland Railway Co. v. Masterson</i> , 126 O. S. 42 (1932) syllabi 1, 5.....	7, 21, 24
<i>Cleveland Railway Co. v. Wendt</i> , 120 O. S. 197, 203-4 ..	18
<i>Detroit, Toledo &amp; Ironton Railroad Co. v. Rohrs</i> , 114 Ohio St. 493, 151 N. E. 714.....	6, 13, 16
<i>Erie Railroad Co. v. Hurlburt</i> , 221 Fed. 907 (C. C. A. 6) .....	14, 18
<i>Erie Railroad Co. vs. Tompkins</i> , 304 U. S. 64...	6, 19, 25, 27
<i>Fluckey v. Southern Railway Co.</i> , 242 Fed. 468 (C. C. A. 6) .....	14, 18
<i>Gerber, et al. v. Borderland Coal Sales Co.</i> , 5 F. (2d) 278 (C. C. A. 6) .....	24
<i>Grand Trunk Railway Co. v. Ives</i> , 144 U. S. 408 (1892) ..	20
<i>Hocking Valley Railway Co. v. Wykle</i> , 122 O. S. 391, 395 .....	6, 14, 17

<i>Kansas City Southern Railway Co. v. Ellzey</i> , 275 U. S. 236, 241 (1927) .....	20
<i>Lang, Admx. v. Pennsylvania Railroad Co.</i> , 59 O. App. 345 (syllabus 1), Ohio Bar, December 26, 1938. . . .	6, 13
<i>Lynch v. United States</i> , 73 F. (2d) 316 (C. C. A. 5)	25
<i>Miller vs. Union Pac. R. Co.</i> , 290 U. S. 227 at p. 232 . . .	18
<i>Patton v. Pennsylvania Railroad Co.</i> , 136 O. S. 159, at page 165 .....	14
<i>Pennsylvania Co. v. Hart</i> , 101 O. S. 196 (syllabus 1)	24
<i>Pennsylvania Railroad Co. v. Rusynik</i> , 117 O. S. 530 (syllabus 1) .....	13
<i>Railroad Co. v. Kistler</i> , 66 O. S. 326, 336, 340.....	15, 22
<i>St. Louis Southwestern Railway Co. v. Simpson, Admx.</i> , 286 U. S. 346.....	7, 20, 24
<i>West et al. vs. Am. Tel. and Tel. Co.</i> , U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, Decided Dec. 9, 1940 .....	6, 19, 25, 27
<i>Wolf, Admr. v. Lake Erie and Western Ry. Co.</i> , 55 O. S. 517 (syllabus 3) . . .	7, 26, 28



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## **PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals For the Sixth Circuit.**

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*To the Honorable, the Supreme Court of the United States:*

The Baltimore and Ohio Railroad Company, a Maryland corporation, respectfully petitioning, shows to the Court:

### **A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.**

This action was brought by the respondent as plaintiff below against the petitioner to recover for injuries to and the wrongful death of Wilma Winland in the Common Pleas Court of Belmont County, Ohio and was removed to the United States District Court for the Southern District of Ohio, Eastern Division, by petitioner. The case was consolidated for trial in the District Court with an action brought by Thomas Winland, husband of Wilma Winland, against the Railroad Company for personal injuries and property damage. Both cases resulted from petitioner's train striking an automobile driven by Thomas Winland, in which Wilma Winland, respondent's decedent, was riding

in the front seat, at a crossing in Belmont County, Ohio. In the District Court the trial resulted in judgments in favor of Thomas Winland for \$1,500 and the respondent for \$15,000. Both cases were appealed to the Circuit Court of Appeals for the Sixth Circuit by the petitioner. The Circuit Court of Appeals affirmed the judgment against petitioner in behalf of the respondent (R. 209), but reversed the judgment against the Railroad Company in behalf of Thomas Winland, holding that the District Court erred (a) "in not directing a verdict for appellant (petitioner here) at the close of all the evidence," and (b) in including the doctrine of "last clear chance" in its instructions to the jury, and remanded the Thomas Winland case to the District Court for a new trial (R. 217).

The opinion of the Circuit Court of Appeals (112 F. (2d) 518, R. 211-217) contains an accurate and complete recital of the factual evidence in the record except that it fails to mention one important item of undisputed evidence as hereinafter noted. The opinion states (pp. 519-20, R. 211-13):

"On Sunday, February 7, 1937, Winland and his wife, Wilma, took his tools to the Stanley Mine, in Belmont County, Ohio, where he was to begin work as a coal miner the following morning. On their return, while crossing appellant's railroad tracks, the 1930 Chevrolet Sedan in which they were travelling was struck by appellant's train. Mrs. Winland was killed and Winland suffered personal injuries and damages to his car.

"The only road from the mine to the main highway is a somewhat tortuous and hilly one. Bearing generally southwest, it crosses appellant's tracks, which run in a southeasterly and northwesterly direction, at a 60° angle. As it nears the scene of the accident it is lower than the tracks, but for a distance of thirty feet adjacent thereto is on the same level. The traveler's view to the west is obstructed by a wooded embankment on his right until he is near the tracks. Appellant introduced evidence to show that a pedes-

trian standing in the road fifteen feet from the tracks could see a man six feet tall walking westerly on the eastbound track until he had gone 496 feet from the intersection; at a distance of ten feet, he could see him 521 feet from the crossing, and from the first, or westbound, track, he could see him 561 feet away. Winland, who was driving, testified that he stopped his car five or six feet from the first, or westbound, track; *that both he and his wife looked each way and listened; that neither saw or heard the train*; that he put his car in low gear and crossed the first track, looking to the east, or his left, as he did so; that, as he started to cross the second, or eastbound, track, he looked again to the west, or to his right, and for the first time saw the train; that it was approaching at about forty-five miles an hour, but that he could not tell how far away it then was; that his car was moving about five miles an hour; that the collision occurred about two seconds after he started his car and about two feet from the point at which he first observed the train; and that he could have stopped his car within a foot at the rate of speed he was going. Appellant's engineer, fireman and brakeman contradict Winland's testimony, which was corroborated by three nearby residents, that the train's whistle was not blown immediately before the accident. The crew does not claim, however, that the whistle was blown at a distance greater than 1,200 feet from the crossing, or that the bell was rung at all; hence, it must be assumed that appellant violated Ohio General Code, § 8853, and was thereby guilty of negligence *per se*.

"The train involved in the accident consisted of an engine, one hundred empty freight cars and a caboose. Appellant's uncontradicted expert testimony shows that air brakes become operative upon a locomotive about three seconds after they are applied, and upon the rest of the train at the rate of about ten cars per second; and that a train of this size, travelling at the rate of twenty miles per hour, cannot be stopped in less than five to six hundred feet after the brakes become operative over the whole train.

"The brakeman testified that he was on the brakeman's seat on the left side of the engine, looking ahead



as the train approached the crossing; that he saw the Winland car, then moving about ten miles an hour, when it was about fifteen feet from the first, or westbound, track, the engine then being about 400 feet from the crossing; that, when the car was about five and the engine about 300 feet from the crossing, he, realizing the car was not going to stop, shouted to the engineer to stop, and immediately heard the air brakes being applied; that he felt the train begin to slow down about the time the engine hit appellee's car, which had pulled onto the eastbound track and stopped. The members of the crew testified that the train's speed, prior to the application of the brakes, was approximately twenty miles per hour, and this testimony is contradicted only by Winland's estimate. It is undisputed that the engine stopped less than 500 feet from the crossing." (Italics ours.)

However, the opinion makes no mention of one other item of undisputed evidence in the record having to do with the actions of Wilma Winland after the automobile started in motion and while it was in the act of crossing the tracks. This appeared on the direct examination of Thomas Winland who first testified that as the automobile approached the crossing, he brought it to a dead stop about five or six feet before reaching the westbound track. He then said: "*We both* looked both ways and listens. *We sees nothing and we hears nothing.*" (R. 54.) He reiterated,—"*We* looked both ways." He then testified that he put his car in low gear and started to cross the tracks. He then said (R. 55):

"I looked down (to the east—toward Blaine) the track, my way was clear, I goes over the westbound track and just before I hits the eastbound track I looks up to see if my way was clear—*me and my wife both.*

Q. What did you see?

A. *We* seen nothing but a train, that is all, when I was on the track just entered over the first rail. (Italics ours.)

\* \* \* \* \*

Q. Tell the jury how far would you say that train was when you looked around and saw it coming up there.

A. I could not say, I do not know. It was just seconds to me, just like seconds, it seemed like I seen it, and it hit me." (R. 55.)

The respondent's petition contained two causes of action. One for \$5,000 for the injuries to Wilma Winland prior to her death, and the other for \$25,000 for her wrongful death (R. 5-7). With respect to the wrongful death cause, the jury was instructed that unless they found the husband, Thomas Winland, to be negligent, they should allow such damages as would fairly compensate him for the pecuniary value of her services and assistance (R. 174). Wilma Winland also left a minor daughter by a former husband (who was still living) and at the time of trial the daughter was living with her own father's family.

### **B. JURISDICTION.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Section 347(a)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered June 7, 1940. Its opinion was filed June 11, 1940. The petitioner's petition for rehearing in that court was filed July 9, 1940, and denied November 15, 1940.

### **C. QUESTIONS PRESENTED.**

Upon the record and the opinion of the Circuit Court of Appeals for the Sixth Circuit, three questions are presented for determination in the event this petition for a writ of certiorari is granted.

1. Should the Circuit Court of Appeals for the Sixth Circuit have reversed the District Court for its failure to direct the jury to return a verdict in favor of the petitioner and against the respondent at the close of all the evidence?

The petitioner contends that the answer to this question should be in the affirmative.

2. Under the evidence, was this case one for the application of the doctrine of "last clear chance" which the District Court charged and the Circuit Court of Appeals for the Sixth Circuit approved? The petitioner contends that the answer to this question should be in the negative.

3. When the Circuit Court of Appeals decided that Thomas Winland, as a matter of law, was guilty of negligence that prevented his recovery, should not the petitioner here be entitled to a new trial in any event under the law of Ohio which denies recovery in a wrongful death action to a beneficiary whose negligence contributed to the death of the decedent? The petitioner contends that this question should be answered in the affirmative.

#### **D. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.**

The Circuit Court of Appeals for the Sixth Circuit failed to follow and apply the applicable law of the State of Ohio as it was bound to do under the decisions of this Court, to wit, *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *West et al. vs. Am. Tel. and Tel. Co.*, U. S. Sup. Ct. Nos. 44, 45, Oct. Term 1940, Decided Dec. 9, 1940. The Ohio cases clearly define the duty of a traveler in a vehicle at a railroad crossing. *Detroit, Toledo & Ironton R. R. Co. v. Rohrs*, 114 O. S. 493, 502, and *Lang, Admx. v. Pennsylvania Railroad Co.*, 59 O. App. 345. The duty of a passenger in a vehicle at a railway crossing is likewise clearly defined in *Hocking Valley Railway Co. v. Wykle*, 122 O. S. 391, 395.

The Circuit Court of Appeals also failed to follow and apply applicable decisions of the Supreme Court of Ohio specifically holding that the court should direct a verdict for defendant when plaintiff's own evidence discloses negligence on his part directly contributing to his injury,

or where evidence offered on plaintiff's behalf fails to rebut the presumption of negligence arising therefrom, to wit, *Cleveland Railway Co. v. Wendt*, 120 O. S. 197, 203-4; and failed to follow and apply decisions of this Court and of the Supreme Court of Ohio specifically holding that "last clear chance" has no application where the negligence of the parties is substantially concurrent, and that "last clear chance" can only apply when the defendant actually became aware of the plaintiff's perilous position and thereafter failed to exercise ordinary care to avoid injuring him, to wit, *St. L. Southwestern Ry. Co. vs. Simpson, Admx.*, 286 U. S. 346, *Cleveland Railway Co. v. Masterson*, 126 O. S. 42, and *Brock v. Marlatt, Admx.*, 128 O. S. 435, 439. The Circuit Court of Appeals likewise failed to follow and apply the well established law of the State of Ohio that a beneficiary, who, by his negligence, contributed to the death of the decedent, is not entitled to recover any damages by reason of decedent's wrongful death, to wit, *Wolf, Admr. v. Lake Erie and Western Ry. Co.*, 55 O. S. 517.

These are all important questions of the local law of Ohio and the decision is manifestly in conflict with such decisions, and is likewise manifestly in conflict with decisions of this Honorable Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 8148, The Baltimore and Ohio Railroad Company v. Albert C. Joseph, Administrator of the Estate of Wilma Winland, Deceased"; that the judgment of said United States Circuit Court of Appeals in said cause be reversed by this

Court; and that petitioner have such other and further relief in the premises as to this Court may seem just.

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